No. 94452-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. 46895-6-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MAYTOWN SAND AND GRAVEL, LLC and PORT OF TACOMA,

Plaintiffs/Respondents,

v.

THURSTON COUNTY,

Defendant/Appellant.

ANSWER TO MEMORANDUM OF AMICUS WASHINGTON STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

WSAMA asks this Court to throw out the jury's fifteen verdicts because plaintiffs/respondents did not appeal a *favorable* administrative decision. Not only does WSAMA largely ignore the *Woods View II v. Kitsap County*[1] case that squarely rejects its argument, but such a needless appeal would have *further* delayed the commencement of mining and *increased* damages. Instead, Maytown Sand and Gravel and the Port of Tacoma (collectively "Maytown") worked to commence mining as soon as the County would allow, properly mitigating damages.

Further, even if WSAMA's argument were correct, the jury's verdicts are independently supported by substantial evidence demonstrating a concerted and years-long effort by County staff, at the direction of the County Commissioners, to destroy the value of Maytown's vested property rights. Accordingly, the Court could do no more than issue an advisory opinion if review were granted. WSAMA argues irrelevant land use law in support of Thurston County's efforts to reverse a jury verdict in a tort case. Its argument is unworthy of this Court's consideration.

II. RESPONSE TO INTEREST OF *AMICUS CURIAE*

The implications of this case for WSAMA's municipal clients are

[1] 188 Wn. App. 1, 25, 352 P.3d 807 (2015) (rejecting argument that plaintiff should have appealed favorable land use decision under LUPA prior to suing for tort damages).

far more limited than WSAMA suggests. The jury found Thurston County liable because the highest elected officials in the County abused their authority to destroy Maytown's property rights for their own political gain. Examples of such gross official misconduct are thankfully rare, and this case is fully consistent with the few other cases addressing official tortious interference in the regulatory setting:[2] municipal government must make regulatory decisions based on laws and facts, not politics.[3]

III. STATEMENT OF THE CASE

Maytown incorporates the facts it recited in its answer to Thurston County's Petition for Review, adding the following relevant details.

The Hearing Examiner ruling on which WSAMA's arguments depend included three decisions, all favorable to Maytown, arising from a single, consolidated hearing. *See* Trial Ex. 446 at 31-35. One decision granted Maytown's request for permit amendments. *Id.* at 33-35. Another decision denied the State Environmental Policy Act (SEPA) appeal filed by the Friends of Rocky Prairie (FORP), a project opponent. *Id.* at 31-33. The third decision granted the SEPA appeal filed by Maytown, agreeing with Maytown that County staff had no authority to subject the amendments to SEPA review, while (at Maytown's request, because

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[2] These include *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989) and *Westmark Dev. Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007).

[3] *Accord Maranatha Mining Inc. v. Pierce Cty.*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990) (holding "the council based its decision on community dis-pleasure and not on reasons backed by policies and standards as the law requires."),

Maytown needed the amendments to start mining) providing no remedy for the staff's unlawful application of SEPA. *Id.* at 30-31. Each of these decisions was favorable to Maytown: the County itself unsuccessfully sought reconsideration of the third decision, Ex. 125, the decision that contained the language that WSAMA and the County argue is an absolute bar to recovery of damages.

FORP appealed the Hearing Examiner's rulings to the Board of County Commissioners, which denied the appeal – a result favorable to Maytown. *See* Ex. 454 at 4. This decision by the Commissioners was the second of two "land use decisions," as defined by LUPA, that the County issued as staff worked to prohibit Maytown from opening its permitted mine. Maytown successfully appealed the first, adverse land use decision to superior court,[4] but Maytown had no basis to appeal, nor standing to appeal, this second, favorable land use decision, which denied its opponent's appeal. The facts related to both County land use decisions were presented to the jury, and no challenge has been made to the Court's rulings regarding admission of this evidence.

[4] The first land use decision was the Commissioners' decision, on the five-year review of the unopened mine, to remand for additional study of critical areas. Ex. 126 at 4-5. The trial court later ruled this decision arbitrary and capricious. *Maytown Sand and Gravel LLC v. Thurston County*, 198 Wn. App. 560, at 573-75, 395 P.3d 149 (2017).

IV. ARGUMENT

A. Neither Amicus nor Thurston County demonstrated that the issues they raise could affect the result of the case

Both WSAMA and Thurston County presume without argument that success on their LUPA preclusion argument would require reversal of the jury's verdict. But, to prevail, Thurston County must demonstrate that "there is no substantial evidence or reasonable inference to sustain a verdict." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 29, 948 P.2d 816 (1997). Like Thurston County, WSAMA does not address this issue in any way. Because the jury's verdict would be upheld even if WSAMA's argument succeeds, WSAMA is effectively seeking an advisory opinion.

The evidence of official animus toward the mine overwhelmingly supports the jury's verdict, even apart from the amendments issues. For example, even if the amendments procedure were proper as a matter of law, the Hearing Examiner also ruled that the County had no authority to subject those amendments to SEPA review. *See Maytown*, 198 Wn. App. at 569 n.8 (citing Ex. 127 at 31). That improper SEPA review added months to the amendments process. *See, e.g.*, RP 1159:5-12, 1180:20-1181:13; RP 1514:2-16; RP 3327:23-24. And that delay is only the beginning. Liability here arose from act after act, by both County Commissioners and staff, that so eroded confidence in the finality of the mining permit that Maytown could not rely on its permit and lost the mine.

This is not simply a delay damages case.

In addition, WSAMA's argument ignores the well-settled doctrine that tortious interference occurs when staff takes otherwise "proper" action for improper purposes.[5] The Hearing Examiner reasoned that staff had discretion to send the amendments to the Examiner, *see* Mem. at 8 (quoting Ex. 446 at 31), but the Hearing Examiner did not make, and could not have made, any ruling regarding staff's purpose in creating this onerous amendments process. And the jury accepted Maytown's substantial evidence that staff exercised its discretion for an improper purpose – to destroy the Maytown mine. *See* RP 3302:24-3310:18. Time and again, staff selected the most onerous process available to create appeal opportunities for project opponents, in the hope that the additional delays would kill the mine. *Id.* Exercising discretion for the improper purpose of preventing a permitted mine from opening subjects the County to liability just as surely as using improper means would. Without a showing that the LUPA argument, if successful, would lead to reversal of even one of the jury's 15 verdicts in Maytown's favor, review by this Court is unnecessary.

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[5] *See, e.g.*, *Pleas*, 112 Wn.2d at 803-04 ("Thus, a cause of action for tortious interference arises from ***either*** the defendant's pursuit of an improper objective of harming the plaintiff ***or*** the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships." (emphasis added)).

B. Maytown's recovery cannot be barred simply because Maytown did not appeal ancillary reasoning for which the law provides no appeal

WSAMA's assertion that the Court of Appeals effected a change in land use law is based upon the mistaken premise that Maytown ignored an adverse decision before seeking damages. In fact, Maytown prevailed on every decision the Hearing Examiner made, and on every amendments issue decided by the Board of County Commissioners. As the prevailing party on the underlying governmental action (the amendments) and the SEPA appeal, Maytown did not have had standing to appeal. None of the jury's verdicts required reversal of the Hearing Examiner's approval of the permit amendments, or reversal of the Hearing Examiner's decision to grant Maytown's SEPA appeal. And none of the jury's verdicts required reversal of the Hearing Examiner's reasoning that staff had discretion to require the amendments process, because evidence demonstrated that staff exercised its discretion for the improper purpose of harming Maytown. *See* RP 3302:24-3310:18. Neither WSAMA nor the County challenges this evidence.

In addition, the law prohibited Maytown from appealing the Hearing Examiner's favorable SEPA ruling because the Hearing Examiner approved Maytown's substantive request for amendments to the permit. State law mandates that SEPA appeals be brought together with a

challenge to the underlying government action: "Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations." RCW 43.21C.075(6)(c). Maytown's success on the underlying government action here – the amendments – and the Commissioner's rejection of FORP's subsequent appeal, meant that Maytown had nothing to appeal, and was absolutely barred from bringing an "orphan" SEPA challenge to the Hearing Examiner's reasoning regarding staff discretion.

There is no conflict between the Court of Appeals' decision in this case and prior decisions. Maytown's damages were not caused by a substantively incorrect decision by the Hearing Examiner: her decision allowed Maytown to mitigate its damages by mining. The damages in this tort case did not arise from an adverse land use decision, so *Lakey* and *Woods View* are on point and consistent with LUPA's plain language:[6] where claims for damages are not caused by an improper "land use decision," LUPA does not apply.

By contrast, the cases WSAMA relies on hold that when an *unfavorable* "land use decision"[7] causes damage, a court must reverse the decision under LUPA before a plaintiff can recover. *See Lakey v. Puget*

[6] RCW 36.70C.030.

[7] LUPA defines "land use decision" in relevant part as the "final determination" on an "application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used". RCW 36.70C.020(2).

Sound Energy, 176 Wn.2d 909, 926-27 & n.11, 296 P.3d 860 (2013) (collecting cases). WSAMA highlights *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 232 P.3d 1163 (2010), which was one of the cases this Court in *Lakey* described as inapposite to actions, such as this one, that do not involve damages arising from an adverse land use decision. *Lakey*, 176 Wn.2d at 926-27.[8]

The plaintiffs in *Mercer Island* sued for injunctive relief and damages arising out of the City's decision to issue a temporary use agreement to allow a church to host a homeless encampment. 156 Wn. App. at 397. They did not challenge the decision administratively; they simply sought to prevent it from going into effect by suing for an injunction, a TRO, damages, and compensation. *Id.* The Court of Appeals ruled that every issue in the case depended on the invalidity of the temporary use agreement. *Id.* at 401-02. The lawsuit thus was a collateral attack on an unappealed land use decision, where a reversal of that decision on direct appeal would have eliminated the alleged damages.

The opposite is true here, because reversal of the Hearing Examiner would actually have *increased* damages by further delaying mining. *Cf. Woods View*, 188 Wn. App. at 7-8 (damages allegedly caused

[8] WSAMA asserts that this Court cited *Mercer Island* "favorably" in the *Lakey* case, Mem. at 10, but the Court cited the case only to explain why it was "inapposite." *Lakey*, 176 Wn.2d at n.11. This is not to say that *Mercer Island* is not good law; rather, *Mercer Island* was irrelevant to *Lakey*, just as it is here.

by delay would have increased after an unnecessary administrative appeal). By the time the Hearing Examiner ruled, Maytown already had suffered from 14 months of improper County actions.[9] Maytown sought the amendments to limit the damages already inflicted, and the Hearing Examiner's decision did limit those damages by allowing mining to commence (after additional staff-caused delay).

Because the Hearing Examiner ruled in Maytown's favor, *Mercer Island* is inapposite to this case, just as it was in *Lakey*. Only by re-casting the Hearing Examiner's ruling as adverse to Maytown can WSAMA argue that the Court of Appeals' decision conflicts with *Mercer Island*. The fact that her favorable decision did not go as far in its reasoning as Maytown requested does not render the decision adverse, or inconsistent with the jury's many, unanimous verdicts in Maytown's favor.

None of the four cases this Court described as "inapposite" in *Lakey* involved tortious interference claims. *James v. Kitsap County* was an action for disgorgement of impact fees.[10] *Lakey*, 176 Wn.2d at 926 n.11. *Asche v. Bloomquist* was an action to abate a nuisance by preventing the construction of a garage, seeking damages only in the

[9] *Compare* Ex. 446 at 35 (decision on April 2011) *with* Ex. 371 at 1 (County reverses 2008 determination of SUP compliance on December 11, 2009).

[10] 154 Wn.2d 574, 115 P.3d 289 (2005). *James* is further irrelevant to this case because the Court expressly declined to rule on the very section of LUPA that controls the question here, RCW 36.70C.030. *Id.* at 586-87 ("[a]t no time have the Developers argued they are not subject to the procedural requirements of LUPA because their claims fall within one of the exceptions enumerated in RCW 36.70C.030(1).").

alternative.[11] *Shaw v. City of Des Moines* was an action for damages arising out of constitutional violation under 42 U.S.C. § 1983.[12] *Mercer Island* was an action for injunction including a claim for damages under 42 U.S.C. § 1983. 156 Wn. App. at 397. The (thankfully rare) tortious interference cases on point are *Pleas*, *Westmark*, *Woods View*, and now, the Court of Appeals decision here. Three of them resulted in substantial damages awards, and, relying on this Court's decision in *Lakey*, *Woods View* passed to the merits of the tortious interference claim after rejecting the very argument WSAMA advances here, 188 Wn. App. at 25.

V. CONCLUSION

WSAMA provides no basis under RAP 13.4 for this Court to review the Court of Appeals' decision regarding LUPA. That decision is consistent with LUPA, with the prior decisions of this Court and the Court of Appeals, and with the evidence that the jury believed.

[11] 132 Wn. App. 784, 796, 133 P.3d 475 (2006).
[12] 109 Wn. App. 896, 37 P.3d 1255 (2002).

RESPECTFULLY SUBMITTED this 25th day of July, 2017.

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Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	94452-1
Appellate Court Case Title:	Maytown Sand and Gravel, LLC v. Thurston County, et al.
Superior Court Case Number:	11-2-00395-5

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